JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

Abd Rahim bin Abd Rahaman v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09–62 OF 2007

B

SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA

7 JUNE 2010

C

Criminal Law — Penal Code — s 377B — Carnal intercourse against order of nature — Whether consent relevant — Offence committed against 14 year 7 month old boy — Accused suffering from HIV — 22 counts of sodomy preferred in two trials — Whether sentence adequate, consideration of

D

Criminal Procedure — Appeal — Appeal against sentence — Grounds on which court will interfere with sentence — Whether grounds supplied contrary to s 305 of the Criminal Procedure Code

E

Criminal Procedure — Appeal — Appeal against sentence — Sodomy of 14 year 7 month old boy — Accused suffering from HIV — 22 counts of sodomy preferred in two trials — Two trial sentences amounting to 60 years' imprisonment and 22 strokes of cane — Whether sentences excessive or against any known legal principle — Balance between public interest and interest of accused

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The accused was charged with 22 counts of sodomy under s 377B of the Penal Code. The offences were committed against a 14-year-7-month old male victim. Ten charges were tried in Sessions Court No 5 and the other 12 were tried in Sessions Court No 6. The prosecution's case was that the accused had drugged his victim before committing the offences. The accused pleaded guilty to all 22 charges and was convicted and sentenced. In respect of the ten charges in Sessions Court No 5, the accused was sentenced to a total of 28 years' imprisonment and ten strokes of the cane. In respect of the 12 charges in Sessions Court No 6, the accused was sentenced to a total of 32 years' imprisonment and 12 strokes of the cane. The accused appealed to the High Court against the sentences but the appeal was dismissed and the sentences affirmed. The accused thus appealed to the Court of Appeal. In the Court of Appeal, counsel for the accused filed several additional grounds of appeal, substantially arguing on the unconstitutionality of s 377B of the Penal Code and its prescribed punishment. Counsel also complained that s 289 of the Criminal Procedure Code ('CPC') which exempted females from whipping,

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JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

A discriminated against males and thus violated art 8(1) and (2) of the Federal Constitution.

Held, dismissing the appeal:

B (1) The new grounds of appeal supplied were contrary to s 305 of the CPC. The instant appeal did not fall within the circumstances circumscribed by *Rex v Leo de Cruz* [1935] MLJ 1 (see para 10(a)).

(2) The sentences were not excessive or against any known legal principles. The accused was suffering from HIV. With his sexual inclination, to C release him among young boys would do no good to society. The sessions court judges had struck a balance between the interest of the public and the interest of the accused (see para 10(b)–(c)).

(3) The constitutional argument postulated the victim's consent to the D sodomy. However when pleading guilty to the charges, the accused had clearly admitted to sodomising the victim without the victim's consent. Further, the issue of consent was irrelevant for a prosecution under s 377B of the Penal Code. The accused was never prejudiced. There was no failure of justice. The convictions were in order (see para 10(d)).

E (4) Any liberal country which had legalised homosexuality would not tolerate the accused's abhorrent excesses since the victim was only 14 years and 7 months when sodomised. The constitutional questions and issues were argued in a vacuum. Without the necessary nexus and without the proper mode of proceedings, the instant case was not the F appropriate case for the constitutional arguments to be canvassed (see para 10(e)–(f)).

[Bahasa Malaysia summary

G Tertuduh dituduh dengan 22 tuduhan liwat di bawah s 377B Kanun Keseksaan ('Kanun'). Kesalahan-kesalahan dilakukan terhadap mangsa lelaki yang berumur 14 tahun 7 bulan. Sepuluh tuduhan dibicarakan di Mahkamah Sesyen No 5 dan 12 tuduhan yang lain dibicarakan di Mahkamah Sesyen No 6. Kes pendakwaan adalah bahawa tertuduh telah memberikan dadah kepada mangsanya sebelum melakukan kesalahan-kesalahan tersebut. Tertuduh telah H mengaku salah terhadap kesemua 22 tuduhan dan disabitkan dan dihukum. Berkaitan sepuluh tuduhan di Mahkamah Sesyen No 5, tertuduh dihukum penjara 28 tahun dan sepuluh sebatan rotan. Berkaitan 12 tuduhan di Mahkamah Sesyen No 6, tertuduh dihukum penjara sejumlah 32 tahun dan 12 sebatan rotan. Tertuduh merayu kepada Mahkamah Tinggi terhadap I hukuman-hukuman tersebut tetapi rayuan ditolak dan hukuman-hukuman tersebut disahkan. Tertuduh oleh itu merayu kepada Mahkamah Rayuan. Di Mahkamah Rayuan, peguam tertuduh memfailkan beberapa alasan rayuan tambahan, sebahagian besarnya berhujah atas ketidakperlembagaan s 377B Kanun dan hukuman yang ditetapkannya. Peguam juga mengadu s 289 Kanun

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

Prosedur Jenayah ('KPJ') yang mengecualikan kaum wanita daripada sebatan, mendiskriminasi terhadap kaum lelaki dan oleh itu mencabuli perkara 8(1) dan (2) Perlembagaan Persekutuan.

Diputuskan, menolak rayuan:

(1) Alasan rayuan baru yang diberikan bertentangan dengan s 305 KPJ. Rayuan ini tidak terangkum di dalam keadaan yang ditetapkan oleh kes *Rex v Leo de Cruz* [1935] MLJ 1 (lihat perenggan 10(a)).

(2) Hukuman-hukuman tidak berlebihan atau bertentangan dengan mana-mana prinsip undang-undang yang ditetapkan. Tertuduh menghidap penyakit HIV. Dengan kecenderungan seksnya, membiarkan dia bersama budak-budak lelaki tidak akan memberi kebaikan kepada masyarakat. Hakim-hakim mahkamah sesyen telah memberi perimbangan di antara kepentingan awam dan kepentingan tertuduh (lihat perenggan (b)–(c)).

(3) Hujahan perlembagaan telah mempostulatkan keizinan mangsa kepada liwat. Walau bagaimanapun apabila mengaku salah terhadap tuduhan-tuduhan, tertuduh jelas mengaku meliwat mangsa tanpa keizinan mangsa. Selanjutnya, isu keizinan tidak relevan untuk pendakwaan di bawah s 377B Kanun. Tertuduh tidak pernah diprejudiskan. Tiada ketidakadilan. Sabitan mengikut peraturan (lihat perenggan 10(d)).

(4) Mana-mana negara liberal yang telah mensahkan homoseksual tidak akan mentoleransi amalan tertuduh yang sangat dibenci memandangkan mangsa hanya 14 tahun dan 7 bulan semasa diliwat. Soalan dan isu perlembagaan dihujahkan secara berasingan. Tanpa neksus yang perlu dan tanpa cara prosiding yang betul, kes ini bukan kes yang wajar untuk penghujahan perlembagaan dirayu (lihat perenggan 10(e)–(f)).]

Notes

For a case on s 377B of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1720.

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 179–183.

Cases referred to

Rex v Leo de Cruz [1935] MLJ 1, CA (refd)

Legislation referred to

Criminal Procedure Code ss 289, 305
Federal Constitution art 8, 8(1), (2)
Penal Code ss 377A, 377B, 377C

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

Appeal from: Criminal Appeal No 42-57 and 58 of 2007 (High Court, Shah Alam)

Fahri Azzat (Amer Hamzah Arshad with him) (Azzat & Izzat) for the appellant.
Shoba a/p Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The appellant was charged with 22 charges of sodomy under s 377B of the Penal Code against a 14 years and 7 months boy (the victim) from 18 April 2007 until 9 May 2007. Ten charges were tried and heard at Sessions Court 5 and another 12 at Sessions Court 6.

[2] The facts are as follows. The victim, one Mohd Farid bin Iskandar had filed a police report, stating, inter alia, that the appellant, a friend of his, had sodomised him at his home. But before sodomising him the appellant had given him something that had caused him to hallucinate. In the report the victim clearly stated that the appellant had inserted his penis into his anus at that house from 18 April 2007 until 9 May 2007. These facts were admitted by the appellant in the course of the proceedings when the facts were read out. The medical report confirmed the penetration as it stated that an 'anal fissure at 1 o'clock measuring 0.5 cm' and 'an anal tear at 6 o'clock measuring 1 cm with signs of fibrosis' were detected at the victim's anus.

[3] The appellant admitted to the facts and thereupon pleaded guilty to the 22 charges at the abovementioned Sessions Court at Shah Alam. For easy reference, the charges, case numbers and sentences have been summarised in the following manner:

Case Number	Charge	Sentence
62–52 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently.
62–54 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–56 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

62–58 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–53 of 2007 (Court 5)	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently.
62–55 of 2007 (Court 5)	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–57 of 2007 (Court 5)	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–59 of 2007 (Court 5)	One charge under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

[4] The sessions court judges had considered the following factors when meting down the sentences, viz:

(a) the number of charges the appellant was charged with, namely 12 at Sessions Court 6, and ten at Sessions Court 5;

(b) the maximum sentence under the relevant provision being 20 years;

(c) the victim was less than 15 years old and not mature enough to know the consequences of his act;

(d) the acts were repeated almost daily from 18 April 2007 until 9 May 2007;

(e) the issue of public interest, what with the rise of this type of cases in our society; and

(f) the danger of allowing the appellant to move freely within the fabric of society whence he is a threat to young boys.

[5] The appellant appealed to the High Court on the solitary ground of sentence in that he:

(a) had repented and requested for another chance; and

(b) would not repeat his mistake.

[6] Come the hearing day at the High Court the appellant denied giving the pills to the victim though did not deny the commission of the offence. With no retraction of the plea of guilt the High Court affirmed the conviction. The

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

sentences were upheld founded on the offences being serious ones, what with the victim being very young and the acts amounted to absolute sexual abuse.

[7] When the matter came before us, the appellant for reasons known only to him and his counsel, filed several additional grounds of appeal, amongst them, that:

(a) s 377B of the Penal Code is contrary to art 8(1) and (2) of the Federal Constitution;

(b) the sentences meted out are contrary to art 8 of the Federal Constitution when read with s 289 of the Criminal Procedure Code;

(c) the judge made a wrong finding of fact that such offences had increased in Malaysia; and

(d) that the overall sentences were too severe.

[8] The appellant had ventilated that s 377B of the Penal Code is unconstitutional as it infringed art 8(1) and (2) of the Federal Constitution. The combined effect of the latter article is that all persons are equal before the law and entitled to the equal protection, and there shall be no discrimination against citizens on the ground only of gender. In the course of the proceedings counsel abhorred the promulgation of s 377B and questioned its legality. Under s 377A of the Penal Code, to bring an individual within the realm of carnal intercourse, there must be an introduction of the penis into the anus or mouth. Learned counsel even ventilated that homosexuality should not be illegal as lesbianism is not. Counsel further submitted that a man is discriminated against just because of his biological make-up whilst the female is saved because of hers.

[9] Pertaining to s 289 of the Criminal Procedure Code females are completely exempted from any whipping in all cases whilst males are exempted only in certain circumstances. We do not think that it was the appellant's view that for the legislation to be fair females should be whipped too. The appellant's counsel submitted that since s 289 of the Criminal Procedure Code discriminated against males it thus must have violated art 8(1) and (2) of the Federal Constitution.

[10] Ironically, despite having submitted in the above vein, which effect would have been the quashing of the charges and resulting in the setting aside of the sentences in the event of success, counsel had instead prayed that the sentences against the appellant be revised and substituted with a proportionate sentence. Having heard the appeal we dismissed it. The broad reasons, inter alia, for its dismissal are as follows:

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

(a) the new grounds supplied do not fall under s 305 of the Criminal Procedure Code. Under this provision it is provided that there shall be no appeal except as to the extent or legality of the sentence. Even the appellant acquiesced to this principle when he correctly cited the case of *Rex v Leo de Cruz* [1935] MLJ 1. Unless this appeal falls under these circumstances the court will not intervene. We, needless to say, found that the sentences are within the scope of the sentence permitted to be meted down by the court;

(b) the sentences are not excessive or have militated against any known legal principles;

(c) learned counsel for the appellant has also admitted that the appellant is an HIV (AIDS) patient. This information is certainly of no help to the appellant. With him riddled with HIV, what with a propensity and life style for certain sexual inclinations, to let him loose among young boys will do no good to society. We were satisfied that the learned sessions court judges had struck a balance between the interest of the public and the interest of the appellant;

(d) the constitutional argument ventilated has a backdrop of the victim giving his supposed consent to the sodomy charges. As mentioned above he totally denied drugging the victim. This is far removed from the truth after having scrutinised the facts. By so pleading guilty without reservation at the subordinate courts, he unequivocally had admitted that when sodomising the victim, consent was never given. On the issue of consent it is trite that in Malaysia, whether consent is given or not, is irrelevant for a prosecution under s 377B of the Penal Code, as opposed to a charge under s 377C of the same Code. A person may be charged under the latter provision if no consent is forthcoming from the victim. Consent is the distinguishing element between the two provisions. But it must be understood that it is the right of the public prosecutor to select the provision for which an accused person is to be charged. In this case, even had there been a technical glitch, whereby the 'wrong' provision was preferred in the charges, on the premise that consent was not given by the victim, the appellant was never prejudiced. With s 377B discounting even a consensual relationship and there being no failure of justice the convictions here therefore were in order;

(e) with the victim aged only 14 years and 7 months when sodomised, any liberal country which has legalised homosexuality between consenting parties so long as they are adults, will surely not tolerate the appellant's abhorrent excesses; and

(f) without the suitable facts and antecedent supporting the constitutional questions, the issues were therefore argued in a vacuum. Without the

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Mar 2 07:38:06 2011
//caseml/case/mlj/2011_002_mlj_28

A necessary nexus and without proper mode of proceedings before us, this was thus not the appropriate case or platform, for the constitutional arguments to be canvassed.

B **[11]** As we found no errors in the sentences meted down by the sessions court judges, which were also affirmed by the High Court we accordingly had dismissed the appeal.

Appeal dismissed.

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Reported by Andrew Christopher Simon

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